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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 JAMES J. HENDRIX,

14 Defendant.

CASE NO. CR19-0024JLR

ORDER DENYING MOTION TO
DISMISS

15 **I. INTRODUCTION**

16 Before the court is Defendant James J. Hendrix's motion to dismiss counts 1, 2,
17 and 4 of the superseding indictment or, in the alternative, to exclude evidence or provide
18 a jury instruction for failure to preserve evidence. (Mot. (Dkt. # 153).) Plaintiff United
19 States of America ("the Government") filed an opposition. (Resp. (Dkt. # 167).) The
20 court has considered the parties' submissions, the relevant portions of the record, and the
21 applicable law. Being fully advised, the court DENIES Mr. Hendrix's motion.

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II. BACKGROUND

On June 21, 2018, officers from the Seattle Police Department (“SPD”) arrested Mr. Hendrix in the parking lot of an auto repair shop. (*See* Def. Tr. Br. (Dkt. # 128) at 2.) SPD officers found Mr. Hendrix on scene standing next to the open driver’s side door of a U-Haul. (*See id.*) After the officers on scene located a shotgun under the driver’s seat of the U-Haul, they arrested Mr. Hendrix. (*See id.* at 2-3.) The SPD impounded the U-Haul and obtained a warrant to search it. (*See* Gov’t Tr. Br. (Dkt. # 106) at 6.) During the search, the SPD located the following items of interest:

- 1) a Mossberg, model 500A, 12 gauge shotgun;
- 2) a Smith and Wesson, model M&P 40 Shield .40 S&W caliber pistol;
- 3) a bag containing a white crystalline substance that a forensic chemist at the DEA laboratory analyzed and concluded was 271.3 grams of pure methamphetamine;
- 4) a packet of green cellophane containing a wallet with the Defendant’s identification, currency, a condom, pens, keys, a ring; foil with drug residue; identification in the name of R.N.; and a series of receipts addressed to “Jimi Hendrix”;
- 5) a police scanner and a walkie-talkie;
- 6) documents, including drug ledgers and a handwritten notice transferring ownership of a BMW;
- 7) various pieces of identification for other individuals, including a wallet with several pieces of identification for Mr. Hendrix;

- 1 8) a backpack containing a scale with drug residue;
- 2 9) a scale on the dashboard;
- 3 10) a holster on the passenger side of the U-Haul;
- 4 11) bear spray;
- 5 12) a safe that contained a handgun magazine that was loaded with .45 caliber
- 6 rounds;
- 7 13) burglary tools;
- 8 14) suspected stolen property;
- 9 15) clothes;
- 10 16) a number of cell phones;
- 11 17) a bag with a black wig and a Halloween-style mask stuffed inside;
- 12 18) an ASP baton;
- 13 19) tire irons; and
- 14 20) a black metal sword in a sheath.

15 (*See id.* at 6-7.)

16 On December 11, 2019, the Government informed Mr. Hendrix that “[t]here were
17 items left in the U-Haul that were not taken into evidence or photographed by the [SPD].”
18 (Mot. at 2.) The following day, the Government followed up with a letter that explained
19 that “[t]here were items in the U-Haul that [the SPD officer conducting the search] did
20 not photograph or enter in evidence because he did not consider them to be of evidentiary
21 value.” (Mot., Ex. 2 at 1.) The items that the SPD officer considered to be of
22 “evidentiary value” were “those that contained contraband, potential evidence of a crime,

1 and ‘D&C’ documents (documents with names/identifications that tend to show
2 dominion and control over the U-Haul and/or its contents).” (*See id.*) The SPD officer
3 who conducted the search “does not have an independent recollection of items that were
4 not documented in his report or photographed.” (*See id.*)

5 Shortly after the SPD searched the U-Haul, the SPD ordered a fingerprint analysis
6 of “the interior cab of the [U-Haul].” (*See Mot.*, Ex. 4 at 1.) On July 5, 2018, SPD’s
7 fingerprint examiner informed the SPD detective who ordered the analysis that she had
8 “finished processing the U-Haul.” (*See Mot.*, Ex. 5 at 1.) The examiner noted, however,
9 that she “noticed items in the cab” and that the detective would need to submit a new
10 fingerprint request on those items if he wanted them analyzed. (*See id.*) The detective
11 responded and informed the examiner that “we have other items in evidence to process,
12 so [I] am fine with leaving the other items in [t]he truck.” (*See id.*)

13 **III. ANALYSIS**

14 Mr. Hendrix now alleges that counts 1, 2, and 4 of the indictment—all of which
15 relate to the June 21, 2018, arrest—should be dismissed due to the Government’s failure
16 to process all of the items within the U-Haul, which allegedly violates Mr. Hendrix’s
17 right to due process. (*See Mot.* at 1-2.) Alternatively, Mr. Hendrix seeks to exclude all
18 evidence obtained from the U-Haul. (*See id.* at 9-10.) Finally, Mr. Hendrix requests an
19 adverse inference instruction stating that the SPD lost evidence from the U-Haul and that
20 evidence may have been favorable to Mr. Hendrix. (*See id.* at 11.) Mr. Hendrix requests
21 an evidentiary hearing to resolve any contested factual matters bearing on these issues.
22 (*See id.* at 6.) In response, the Government claims that none of these sanctions are

1 warranted because Mr. Hendrix has not shown that the evidence at issue would be
2 exculpatory or that the Government acted in bad faith. (*See* Resp. at 1-2.)

3 The court first considers whether Mr. Hendrix is entitled to an evidentiary hearing
4 before moving to the merits of his motion.

5 **A. Request for an Evidentiary Hearing**

6 As a threshold matter, the court addresses Mr. Hendrix’s request for an evidentiary
7 hearing. Generally, evidentiary hearings must be held “only when the moving papers
8 allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to
9 conclude that contested issues of fact exist.” *United States v. Howell*, 231 F.3d 615, 620
10 (9th Cir. 2000). Mr. Hendrix has not met that burden here. The relevant factual issues
11 for this motion center on the SPD’s search of the U-Haul—specifically, the motion
12 addresses the search of the U-Haul and whether the SPD acted in bad faith in deciding
13 not to photograph and catalog all of the items found within the U-Haul. (*See* Mot. at 7-
14 9.) Despite Mr. Hendrix’s claim to the contrary, his moving papers did not “allege facts
15 with sufficient definiteness, clarity, and specificity to enable the trial court to conclude
16 that contested issues of fact exist.” *See Howell*, 231 F.3d at 620.

17 First, regarding the search of the U-Haul, the Government’s letter explains (1)
18 what evidentiary items the SPD officer found and catalogued in the U-Haul; (2) why the
19 SPD officer catalogued and photographed some, but not all, of the items in the U-Haul;
20 and (3) that the SPD officer does not have an independent recollection of the items in the
21 U-Haul that were not collected or photographed. (*See* Mot., Ex. 2. at 1-2; *see also* Resp.
22 at 2.) Mr. Hendrix’s motion does not contest any of those facts. Rather, Mr. Hendrix

1 argues about the legal implications of the SPD's actions, which is a matter for the court,
2 and does not require an evidentiary hearing.

3 Second, regarding bad faith, Mr. Hendrix claims that there is at least a dispute
4 over bad faith because, although Mr. Hendrix had informed the SPD that his defense was
5 that he had "nothing to do" with the U-Haul, the SPD still "spoiled evidence in the U-
6 Haul" when it failed to collect preserve every item in the U-Haul. (*See* Mot. at 8.) The
7 court rejects Mr. Hendrix's claim that this argument creates a relevant factual dispute. As
8 discussed in more detail below, *see infra* § III.B.1-2, because there is no evidence as to
9 what items were left in the U-Haul, the court cannot conclude that those items were
10 exculpatory under *California v. Trombetta*, 467 U.S. 479 (1984), or even "potentially
11 useful" under *Arizona v. Youngblood*, 488 U.S. 51 (1988). Without any evidence that
12 law enforcement lost or destroyed exculpatory or "potentially useful" evidence, alleged
13 bad faith on the part of the SPD is not relevant under either *Trombetta* or *Youngblood*.
14 Further, even if bad faith were at issue, the court rejects Mr. Hendrix's nondescript claim
15 that there is a dispute over bad faith merely because the SPD did not collect all items in
16 the U-Haul despite knowledge of Mr. Hendrix's claim that the U-Haul did not belong to
17 him. Mr. Hendrix must allege facts supporting his bad faith theory with "definiteness,
18 clarity, and specificity" before the court can grant an evidentiary hearing. *See Howell*,
19 231 F.3d at 620. Mr. Hendrix's motion falls woefully short of carrying that burden.

20 Because Mr. Hendrix has not shown that there are any contested issues of fact, the
21 court DENIES his request for an evidentiary hearing.

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1 **B. Due Process Claim**

2 The Government's failure to preserve evidence violates due process in two
3 scenarios: (1) when the unavailable evidence "possess[es] an exculpatory value that was
4 apparent before the evidence was destroyed, and [is] of such a nature that the defendant
5 would be unable to obtain comparable evidence by other reasonably available means,"
6 *California v. Trombetta*, 467 U.S. 479, 489 (1984); and (2) where the Government's
7 failure to preserve "potentially useful" evidence—as opposed to exculpatory evidence—
8 was done in bad faith, *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). The court
9 considers these issues in turn.

10 1. Exculpatory Value

11 Under *Trombetta*, the key question is whether an item's exculpatory value is
12 apparent before it is lost or destroyed. *Trombetta*, 467 U.S. at 489. Evidence is
13 exculpatory if it is "favorable to an accused" and "material either to guilt or to
14 punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "Exculpatory evidence is
15 material if its introduction at trial would have resulted in a markedly weaker case for the
16 prosecution and a markedly stronger one for the defense." *See Comstock v. Humphries*,
17 786 F.3d 701, 711 (9th Cir. 2015) (citations omitted). Mere speculation regarding the
18 exculpatory value of evidence is not sufficient to establish that the evidence is
19 exculpatory. *See United States v. Drake*, 543 F.3d 1080, 1090 (9th Cir. 2008) ("The
20 exculpatory value of an item of evidence is not 'apparent' when the evidence merely
21 'could have' exculpated the defendant.").

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1 It is not clear whether Mr. Hendrix asks the court to find that the items in the
2 U-Haul that the SPD did not collect or photograph had “exculpatory value.” Mr. Hendrix
3 identifies the two relevant due process standards under *Trombetta* and *Youngblood* and
4 half-heartedly asserts that “under either test, relief is warranted.” (Mot. at 6-7.) But Mr.
5 Hendrix makes no attempt to argue that the items in the U-Haul had exculpatory value,
6 let alone that the SPD knew that those items were exculpatory when it failed to collect or
7 photograph them. (*See id.*) Indeed, it would be nonsensical for Mr. Hendrix to argue that
8 the uncollected items in the U-Haul were “exculpatory” given that neither Mr. Hendrix
9 nor the Government knows what those items are. The only available evidence shows that
10 the SPD collected and photographed the items that it believed had “evidentiary value”
11 and left everything else in the U-Haul. (*See* Mot., Ex. 2 at 1-2; Resp. at 2.) The court
12 will not jump from those facts to the conclusion that the items the SPD left behind would
13 have exculpated Mr. Hendrix. Thus, Mr. Hendrix cannot establish a due process
14 violation under *Trombetta* and its progeny.

15 2. Potentially Useful Evidence

16 Mr. Hendrix also cannot establish that the items left behind in the U-Haul were
17 were “potentially useful” evidence under *Youngblood*. “Potentially useful” evidence is
18 “evidentiary material of which no more can be said than that it could have been subjected
19 to tests, the results of which might have exonerated the defendant.” *Youngblood*, 488
20 U.S. at 57. The only things that the court knows about the items within the U-Haul are
21 that the SPD collected and photographed a lengthy list of items that it believed had
22 “evidentiary value”—including firearms, narcotics, identification documents, various

1 suspicious electronics, documents, burglary tools, backpacks, a drug ledger, items of
2 clothing, bear spray, and a drug scale—and left everything else in the U-Haul. (*See*
3 Gov’t Tr. Br. at 6-7; Mot., Ex. 2 at 1-2.) Without any information about the remaining
4 items, the court will not conclude that those items were potentially useful to Mr. Hendrix
5 merely because they were in the U-Haul.

6 Moreover, even if Mr. Hendrix could show that “potentially useful” items were
7 lost, there is no evidence that the SPD acted in bad faith. Where lost or destroyed
8 evidence is only “potentially useful,” the defendant alleging due process violations bears
9 the burden to show that law enforcement acted in bad faith in losing or destroying the
10 evidence. *See Youngblood*, 488 U.S. at 57 (“We therefore hold that unless a criminal
11 defendant can show bad faith on the part of the police, failure to preserve potentially
12 useful evidence does not constitute a denial of due process of law.”). Mr. Hendrix argues
13 that the SPD acted in bad faith because it knew that Mr. Hendrix had claimed that other
14 people were responsible for items in the U-Haul but they “destroyed evidence that could
15 have pointed to” those other suspects. (*See* Mot. at 7.) As noted above, there is no basis
16 for the allegation that the SPD “destroyed evidence.” Further, there is also no evidence
17 of bad faith. The SPD searched the U-Haul and collected the items that it believed had
18 “evidentiary value” and then released the U-Haul. (*See* Mot., Ex. 2 at 1-2.) There is no
19 evidence suggesting that the SPD selectively collected only the items that would
20 implicate Mr. Hendrix or that its release of the vehicle or identification of relevant
21 evidence was out of the ordinary. If the failure to collect every item at the scene of a
22 crime—regardless of the apparent evidentiary value of the items—constituted bad faith,

1 then law enforcement agencies would be required to seize every available item at any
2 crime scene in order to avoid due process complaints. The Supreme Court has
3 specifically rejected that interpretation of due process. *See Youngblood*, 488 U.S. at 58
4 (recognizing the Court’s “unwillingness to read the ‘fundamental fairness’ requirement of
5 the Due Process Clause as imposing on the police an undifferentiated and absolute duty
6 to retain and to preserve all material that might be of conceivable evidentiary significance
7 in a particular prosecution.” (citation omitted)).

8 Mr. Hendrix’s argument that the SPD acted in bad faith by failing to fingerprint
9 every item found in the U-Haul is also not persuasive for the same reason. (*See* Mot. at
10 9.) Mr. Hendrix cannot point to any basis for his suggestion that the SPD was obligated
11 to fingerprint everything found in the U-Haul. The SPD detective in charge of the search
12 of the U-Haul requested fingerprinting of the cab of the U-Haul and other items of
13 evidentiary value. (*See* Mot., Ex. 5 at 1.) In total, the SPD analyzed 34 different items
14 for fingerprints. (*See* Resp. at 2.) There is no evidence that the SPD’s decision to
15 fingerprint the evidentiary items that it believed were most relevant was made in bad faith
16 or outside of normal police practices. Indeed, if the court were to hold that the SPD acted
17 in bad faith by failing to fingerprint every item in the U-Haul, it would set an unworkable
18 standard for law enforcement.

19 Thus, the court concludes that Mr. Hendrix has not shown that the items the SPD
20 left in the U-Haul had exculpatory value or that the SPD acted in bad faith by failing to
21 collect or fingerprint those items. Accordingly, the court DENIES Mr. Hendrix’s due
22 process challenge and his request to dismiss counts 1, 2, and 4.

1 **C. Alternative Sanctions**

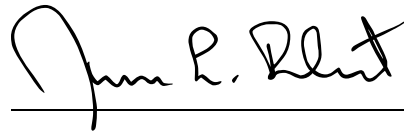
2 In the Ninth Circuit, “[t]he rule governing sanctions for lost or destroyed evidence
3 is found in the controlling concurrence in *United States v. Loud Hawk*.” *United States v.*
4 *Robertson*, 895 F.3d 1206, 1213 (9th Cir. 2018) (citing *United States v. Loud Hawk*, 628
5 F.2d 1139 (9th Cir. 1979) (en banc) (Kennedy, J., concurring), *reversed on other grounds*
6 *in United States v. W.R. Grace*, 526 F.3d 499, 506 (9th Cir. 2008)). According to *Loud*
7 *Hawk*, a court’s “principal concern is to provide the accused an opportunity to produce
8 and examine all relevant evidence to insure a fair trial.” *Loud Hawk*, 628 F.2d at 1152.
9 In determining whether sanctions are necessary to protect the interests of the accused,
10 courts must balance “the quality of the Government’s conduct” against “the degree of
11 prejudice to the accused.” *Id.* In conducting that balancing test, the Government bears
12 the burden of justifying its conduct and the accused of demonstrating prejudice. *Id.*
13 Sanctions against the Government, including suppression of evidence, may be imposed
14 even in the absence of bad faith or a constitutional violation. *See United States v. Flyer*,
15 633 F.3d 911, 916 (9th Cir. 2011) (citing *Loud Hawk*, 628 F.2d at 1152).

16 Mr. Hendrix is not entitled to sanctions under the *Loud Hawk* balancing test. The
17 court has no concerns with the quality of the Government’s conduct in searching the
18 U-Haul and fingerprinting the U-Haul and some, but not all, of the items within the U-
19 Haul. Further, the court cannot find that Mr. Hendrix is prejudiced by the loss of items
20 that neither party knows anything about. Accordingly, Mr. Hendrix is not entitled to
21 exclusion of evidence or a jury instruction. Thus, the court DENIES Mr. Hendrix’s
22 request for sanctions.

1 **IV. CONCLUSION**

2 For the reasons set forth above, Mr. Hendrix's motion to dismiss counts 1, 2, and 4
3 or, in the alternative, to exclude evidence and provide a jury instruction for failure to
4 preserve evidence (Dkt. # 153) is DENIED.

5 Dated this 17th day of December, 2019.

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8 JAMES L. ROBART
9 United States District Judge
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